Supreme Court, U.S.
F I L E D
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No. 97-1072

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

VIRGINIA STATE CORPORATION COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR AMERICAN PUBLIC COMMUNICATIONS COUNCIL IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the provision of the Telecommunications Act of 1996 directing the Federal Communications Commission to regulate the "compensation" of payphone service providers "for each and every completed intrastate and interstate call" is anything less than an "unambiguous" and "straightforward" preemption of state regulation of payphones' local call rates.

2. Whether general FCC guidelines for the continuing state regulation of certain other aspects of payphone service constitute an unconstitutional "conscription" of state regulators to administer federal law. This question was not raised before the FCC or in the briefs or oral argument in the Court of Appeals, and was first asserted only in petitions for rehearing after the Court of Appeals' decision.

RULE 29.6 STATEMENT

American Public Communications Council is a trade association of nearly 2,000 companies that provide independent payphone service and supply goods and services to such providers. It has no parent companies or nonwholly owned subsidiaries for whom disclosure is required by Rule 29.6.

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BRIEF FOR AMERICAN PUBLIC COMMUNICATIONS COUNCIL IN OPPOSITION

STATUTE INVOLVED

The Telecommunications Act of 1996 contains a section on "Provision of payphone service," 47 U.S.C. § 276, which reads as follows in pertinent part:

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that--

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation; . . .

(2) Public interest telephones

In the rulemaking conducted pursuant to paragraph (1), the Commission shall determine whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably.

(c) State preemption

To the extent that any State requirements are inconsistent with the

Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements.

STATEMENT

As directed by Congress in Section 276 of the Telecommunications Act of 1996, the Federal Communications Commission conducted a rulemaking proceeding to implement changes in the regulation of payphones necessitated by the advent of competition between independent payphone service providers and the local telephone companies, which had traditionally monopolized payphones and subsidized them with revenue from their other services. Among other changes designed to assure effective competition, Section 276 directed the FCC to take over regulation of some *intra*state aspects of payphone service that were previously the exclusive province of state regulatory commissions. The Act specifically provided that state regulation would be preempted to that extent.

The FCC's rulemaking proceeding resulted in a 189-page Report and Order and a 117-page Order on Reconsideration. Pursuant to Section 276(b), the Commission adopted regulations and policies to govern limited aspects of payphone operations. These FCC regulations and policies supersede state regulation of the charges payable by individual payphone users for local coin calls, which were formerly set by the states; establish the charges payable by long distance carriers to payphone owners for both intrastate and interstate long distance calls directed to such carriers by virtue of the dialing sequence;[1] require elimination of cross-subsidies and

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[1] These consist of "dial around" calls (calls directed by access codes such as 10AT&T, 1-800COLLECT, 1-800CALLAT&T, etc.) and toll free

(Footnote continued)

other barriers to independent payphone competition; and establish general guidelines for states to follow in providing for "public interest payphones" in locations where the state determines that payphones are needed but would otherwise be unavailable because they are not economically self-supporting.[2] *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the*

(Footnote continued)

calls to merchants and others using their 800 numbers. Such calls are directed to the long distance carrier by virtue of the dialing sequence entered by the caller rather than by a mechanism in the telephone apparatus automatically sending the call to a carrier designated by the payphone provider.

[2] Contrary to the implications of the Petition (*e.g.*, Pet. 7), state regulation of payphones is by no means entirely displaced by either the Act or the Commission's regulations and policies. With the exception of setting specific rates for local coin calls (including directory assistance calls), the states remain free to regulate all of the matters that Petitioners describe as "historically . . . addressed" by state regulation (Pet. 3). Similarly, states remain free under Section 276 to regulate the matters that were at issue in *Universal Payphone Corp.*, 58 Rad. Reg. 2d (P&F) 76 (1985) (Pet. App. 45-46), which Petitioners cite as exemplifying the proper scope of state jurisdiction (Pet. 4). The states retain general jurisdiction over locations and physical characteristics of phonebooths, consumer disclosures, charges to payphone operators for their connections to the local telephone network, all rates and charges paid by payphone users for all intrastate toll or extended usage, surcharges to end users for long distance calls, and virtually all other aspects of payphone operations. The Commission has within the last month affirmed state control over the rates and other consumer safeguards applicable to operator assisted calls from payphones. *Billed Party Preference for InterLATA 0+ Calls*, CC Docket No. 92-77, FCC 98-9, ¶¶ 52, 54-55 (Jan. 29, 1998).

Neither the Act nor the Commission's regulations and policies

(Footnote continued)

Telecommunications Act of 1996, CC Docket No. 96-128, 11 FCC Rcd. 20541 (Sept. 20, 1996) ("*Report and Order*"), *reconsidered*, 11 FCC Rcd. 21233 (Nov. 8, 1996) ("*Reconsideration Order*").[3]

Numerous parties to the FCC proceedings were dissatisfied with the regulations and policies adopted by the Commission. Twenty separate petitions for review, many with multiple petitioners, were filed in the Court of Appeals, consolidated, and dealt with in the opinion below. The Court of Appeals remanded to the Commission for further consideration of major issues concerning the amounts of compensation to be paid by long distance carriers for calls originating at payphones, and the valuations that local telephone companies should assign to their preexisting payphone facilities in removing them from their ratebases. Numerous other objections -- including serious objections by the present Respondents -- were, however, rejected by the Court of Appeals.

Only the present Petitioners -- one of the nine state regulatory commissions and one of a few consumer advocates that sought review in the Court of Appeals -- have petitioned for further review in this Court.[4] Petitioners raise one issue that was decided adversely to them by the Court of Appeals --

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(Footnote continued)

require any state to establish a public interest payphone program unless the state itself determines that such payphones are needed to supplement the payphones provided by normal market forces.

[3] The *Report and Order* is set forth at JA 131-328 in the Joint Appendix in the Court of Appeals, and the *Reconsideration Order* is set forth at JA 329-452.

[4] Neither the National Association of Regulatory Utilities Commissioners (NARUC) nor any of the remaining 39 state commissions sought review below.

contending that the Commission misinterpreted Section 276(b)(1)'s grant of jurisdiction over per-call "compensation" to payphone service operators as including the "coin rates" paid by individual users to make local calls.[5] They also seek to raise an objection that they did not present to the Commission at any time (including the petition for reconsideration in which they joined) or to the Court of Appeals until they sought rehearing of its decision, and which the Court of Appeals had no occasion to discuss. This belated objection contends principally that the Commission's policy statement and regulation implementing Section 276(b)(2) by giving state agencies the principal role in determining the placement and financing of public interest payphones constitutes an unconstitutional "conscription" of state officials as enforcers of a federal program in violation of the principles of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 117 S. Ct. 2365 (1997).[6]

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[5] After finding that existing state regulation had tended to keep coin rates for local calls below fairly compensatory levels (for example, having been unchanged since 1983 in Virginia, *see* Pet. 3) and prevented efficient deployment of payphones, the Commission adopted a federal policy displacing state regulation of local coin rates after a one-year interim period. Thereafter, local coin rates would be determined by competitive market forces, without regulatory interference except in situations where unremediable market disfunctions might unduly impair competition. The states were encouraged to recommend further consideration of any such situations by the FCC, and the *Report and Order* also noted that the FCC might independently find it appropriate to review the working of the deregulatory policy after the interim period and take further action with respect to local coin rates. *Report and Order* ¶¶ 55-62 (JA 159-63); *Reconsideration Order* ¶¶ 9-10 (JA 335-36).

[6] After an analysis of the existing state requirements for public interest payphones and the comments on this subject, the Commission

(Footnote continued)

As to the first issue, the Commission held, and the

(Footnote continued)

concluded that there was a need for national minimum guidelines but that

> the states have the authority to adequately address the need for public interest payphones, and that any effort to implement a uniform national program is unlikely to be as successful in accounting for differing conditions among the states . . . [and] would be beyond [the FCC's] current resource capabilities. For all of the above reasons, [the FCC] conclude[s] that the primary responsibility for administering and funding of public interest payphone programs should be left to the states.

Report and Order ¶ 280 (JA 270); *see also id.* ¶¶ 264-279 (JA 262-70). The appropriateness of giving this role to the states was not discussed further in the *Reconsideration Order* because none of the petitions for reconsideration questioned it. *See Reconsideration Order* ¶¶ 244-256 (JA 436-41).

The federal guidelines, stated in paragraphs 283-285 of the *Report and Order* (JA 271-74), apply only to the extent the state itself determines that its economic conditions require a public interest payphone program. The guidelines interpret the statutory requirement of "fair and equitable" support for public interest payphones as requiring fair compensation that equitably distributes the cost, is competitively neutral, and does not depend upon subsidies from other services, but may be financed by levying a charge on all payphone providers, by appropriating public funds, or in accordance with state universal service rules, as determined by each state. Paragraph 286 further provides that "[i]f interested parties believe that a state is not supporting public interest payphones fairly and equitably, such parties may file a petition with the [FCC] . . ." (JA 274). The regulation adopted by the Commission simply provides that each state must determine whether its rules and policies are consistent with applicable FCC guidelines, consider any additional measures that may be needed, and "administer and fund such programs so that such payphones are supported fairly and equitably." 47 C.F.R. § 64.1330(c) (JA 325-26).

Court of Appeals agreed, that Section 276's direction that the FCC "establish a per call compensation plan" encompassing "each and every completed intrastate and interstate call" assigned to the FCC jurisdiction over the end user coin rates for local calls that had previously been set by state regulators as an element of their comprehensive regulation of local telephone service. *Report and Order* ¶ 58 (JA 161); Pet. App. 15-19. The Court held that the language of Section 276(b)(1) gives the Commission "an express mandate to preempt State regulation of local coin calls" (Pet. App. 19), and that it does so "unambiguously" is confirmed by the fact that "Congress has . . . used the term 'compensation' elsewhere in the Act in such a way so as to encompass rates paid by callers" (Pet. App. 17-18).[7] The Court found this interpretation consistent with this Court's requirement of legislative language "'so unambiguous or straightforward so as to override the command of § 152(b) [generally preserving state jurisdiction over intrastate communications].'" Pet. App. 16 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 377 (1986) ("*Louisiana PSC*")).

The "state conscription" issue that Petitioners attempt to raise never surfaced until the petitions for rehearing they filed after the Court of Appeals' decision. Neither Petitioners nor any other participant raised any such contention either before the Commission or in the briefing of the petitions for review in the Court of Appeals. The Court of Appeals denied all petitions for rehearing (including petitions by these

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[7] Although Petitioners now disparage the Court's reference to the usage of the term "compensation" elsewhere in the statute to encompass charges paid by end users (Pet. 9), the Court was actually responding to Petitioners' contention that there was no such usage elsewhere in the statute (Pet. App. 16-17).

Respondents and others) by order (Pet. App. 37-44)[8] and therefore had no occasion to discuss Petitioners' belated attack on this aspect of the regulations and policies adopted by the Commission.

REASONS FOR DENYING THE PETITION

I. THE STATUTORY MANDATE FOR FEDERAL REGULATION OF "COMPENSATION" FOR "EACH AND EVERY COMPLETED INTRASTATE. . . CALL" PREEMPTS STATE REGULATION OF PAYPHONE COIN RATES SO CLEARLY THAT NO CONCEIVABLE QUESTION IS RAISED REGARDING THE CRITERIA OF *LOUISIANA PSC*

The Court of Appeals correctly articulated and applied the rule of statutory construction that this Court derived from 47 U.S.C. § 152(b)(1) in its 1986 *Louisiana PSC* decision. Section 276 of the Telecommunications Act of 1996 is both "unambiguous" and "straightforward" (*see* 476 U.S. at 377) in subsection (b)(1)'s direction that the FCC "prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate . . . call using their payphone" and subsection (c)'s express preemption of any state requirements inconsistent with that plan. These specific provisions of Section 276 plainly suffice, under the criteria of *Louisiana PSC*, to supersede *pro tanto* Section 152's general reservation of local telephone regulation to the states.

If the "compensation" the FCC is directed to regulate did not include the major portion of payphone revenues that comes from coins inserted for local calls, it would fall far short of encompassing "each and every completed

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[8] The Court did clarify its decision in respects that are not pertinent to the present Petition. *See* Pet. 1.

intrastate . . . call" and the Act could not possibly fulfill its express federal goals of promoting payphone "competition" and "widespread deployment." 47 U.S.C. § 276(b)(1). Unlike *Louisiana PSC*, this case does not depend upon any claim of implied preemption or indirect authority to take away a ratemaking function otherwise entrusted to the states.[9] Here, Congress' specific intent to alter the traditional division of jurisdiction by preempting state regulation of payphone coin rates is stated directly and unequivocally.[10]

There is no substance whatever to Petitioners' muted suggestion of some kind of conflict between the decision below and that in *Iowa Utilities Board v. FCC*, 120 F.3d 753

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[9] The statute on which the FCC relied in *Louisiana PSC* merely authorized the FCC to establish depreciation rules. Its language did not give the FCC jurisdiction to make intrastate depreciation rules, much less to dictate a substantial element of the intrastate rates as to which Section 152(b) generally preserved state jurisdiction. As this Court pointed out, the word "preemption" was nowhere used in the statute, and it was "at least possible . . . that the section was intended to do no more than spell out the authority of the FCC over depreciation in the context of interstate regulation." 476 U.S. at 377.

[10] Indeed, the House Conference Report explains that the FCC's compensation regulations were to be "a new system," "[i]n place of the existing regulatory structure," and that "the Commission is not bound to adhere to existing mechanisms or procedures established for general regulatory purposes in other provisions of the Communications Act." H.R. Conf. Rep. No. 104-458, at 158 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 171.

There is nothing in *Louisiana PSC* remotely suggesting that Section 152(b)(1) precludes Congress from making such an unambiguous supervening grant of federal jurisdiction unless Congress also refers to Section 152(b)(1) by name. Rather, *Louisiana PSC* stated the test as simply "whether Congress intended that federal regulation supersede state law." 476 U.S. at 369.

(8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utilities Board,* 118 S. Ct. 879 (1998), 66 U.S.L.W. 3387, 3459, 3474, 3484, 3490 (U.S. Jan. 26, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141). The Eighth Circuit explicitly (and correctly) distinguished that case from the present one:

> Congress is fully capable of opening the gate in the [§ 152(b)] fence in order to grant the FCC intrastate rate-making authority when it wishes to do so. . . . [S]ection 276 of the Telecommunications Act itself directly requires the FCC to establish a compensation plan regarding both intrastate and interstate pay phone calls. 47 U.S.C.A. § 276(b); *Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 561-62 (D.C. Cir. 1997). The FCC's roundabout construction in its effort to claim intrastate pricing authority [in the *Iowa Utilities Board* case] . . . is notably strained in stark comparison to the direct grant of such authority contained . . . in section 276 of the Telecommunications Act . . . .

120 F.3d at 797. Thus, whether or not the Eighth Circuit's limitation of the FCC's authority over the different subject matter involved in *AT&T Corp. v. Iowa Utilities Board* is upheld by this Court will have no impact on the correctness of the decision below in this case, where the Commission has an explicit legislative grant of preemptive regulatory authority over intrastate payphone rates.

II. THERE IS NO OCCASION FOR REVIEW OF THE TENTH AMENDMENT "CONSCRIPTION" ISSUE THAT PETITIONERS WOULD PRESENT BECAUSE IT WAS NOT CONSIDERED OR TIMELY RAISED BELOW, AND IN ANY EVENT IT IS INSUBSTANTIAL

The Tenth Amendment objection to certain aspects of the Commission's payphone regulations that Petitioners seek to raise in this Court was never presented to the Commission, although numerous petitions for reconsideration were filed there on other issues.[11] Nor was it presented to the Court of Appeals in the briefs or oral argument. Petitioners attempted to raise such an objection, for the first time, in petitions for rehearing of the Court of Appeals' decision, but the Court declined the invitation and denied rehearing in a one-sentence order (Pet. App. 37-38). This was in accord with the generally accepted rule against entertaining new issues for the first time on rehearing. *E.g.*, *Kale v. Combined Ins. Co. of America*, 924 F.2d 1161, 1169 (1st Cir. 1991); *Sierra Club v. Hodel*, 848 F.2d 1068, 1100-01 (10th Cir. 1988); *Moore v. United States*, 598 F.2d 439, 441-42 (5th Cir. 1979). Moreover, Petitioners were barred from raising such an objection on judicial review at all because they never gave the Commission an opportunity to consider it. 47 U.S.C. § 405(a); *e.g.*, *American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173, 1177 (D.C. Cir. 1995).

This Court normally declines to review issues that were not timely raised before the court of appeals. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *see Sisson v. Ruby*, 497 U.S. 358, 359-60 n.1 (1990); *Adickes v. S.H. Kress & Co.*,

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[11] Petitioner Virginia State Corporation Commission joined in one such petition to the Commission on other issues. *See* JA 446. Petitioner Texas Office of Public Utility Counsel did not request any reconsideration by the Commission.

398 U.S. 144, 147 n.2 (1970). No special circumstances could possibly justify any departure from this prudential rule here. Although one of the cases that Petitioners cite in their discussion of this proposed issue, *Printz v. United States*, 117 S. Ct. 2365 (1997), was decided only shortly before the opinion below, the theory on which they rely long anteceded that decision, and indeed their Petition places its heaviest reliance on the 1992 decision in *New York v. United States*, 505 U.S. 144 (1992).

Moreover, there is no substance to Petitioners' attempt to analogize this case to *New York* and *Printz*. *New York* held that Congress could not compel state legislatures to establish programs for disposal of radioactive wastes under federally specified criteria. *Printz* rejected an attempt by Congress to assign federal law-enforcement functions to unwilling state officials, refusing to allow the federal government to "impress into its service . . . the police officers of the 50 States." 117 S. Ct. at 2378. There is no such attempt here to "coerce" the states to embark on federally mandated activities. Here, in contrast, all that is involved is an instruction that state agencies regulating payphones -- as they traditionally have done and continue to do in most respects[12] -- should do so in the light of federal statutory policy.

Both *Printz* and *New York* distinguished the situations they condemned from those which this Court held permissible in *FERC v. Mississippi*, 456 U.S. 742 (1982). *FERC* upheld a federal statute that explicitly specified elaborate substantive and procedural standards to be followed by the states in regulating electric and gas utilities, thereby "attempt[ing] to use state regulatory machinery to advance federal goals." *Id.*

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[12] *See supra* note 2. As previously noted, the states are not required to have public interest payphone programs unless they determine that market forces will not provide sufficient payphones to satisfy the needs of their citizens.

at 759. Nonetheless, that statute did not unduly intrude upon state sovereignty because the states had the option to withdraw from the regulatory field entirely and leave the subject to preemptive regulations that the Federal Energy Regulatory Commission might adopt. In *FERC*, as in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981), this Court found no reason why the federal requirements "'should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.'" 456 U.S. at 764 (quoting *Hodel*).

The situation here is much less intrusive than that in *FERC*. Apart from simply advising the states that they must not interfere with the specific preemptive regulations adopted by the FCC,[13] the policy statement and regulation simply (1) declare that any public interest payphones should be maintained in a manner that provides fair compensation and is competitively neutral and (2) instruct state regulators to take such measures as they deem appropriate to conform their payphone programs with those goals and "ensure that such public interest payphones are supported fairly and equitably." What measures are appropriate, fair, and equitable in light of these guidelines -- and indeed whether public interest payphones are needed at all in light of local economic conditions -- are left for each state regulatory agency to determine, subject to federal supervision only to the extent that parties dissatisfied with a state's rules in this regard may

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[13] Petitioners' complaint that the *Report and Order* "compel[s] states to adopt the national deregulatory standard" (Pet. 22) does not involve any element of "conscription" within the meaning of *New York* or *Printz*. The states are required to honor the FCC's decision to deregulate the local coin rate as the inexorable consequence of FCC preemption, which the Court of Appeals correctly held was required by Section 276.

petition the FCC to adopt preemptive regulations of its own.[14] Thus, the FCC's guidelines stating the factors to be considered are even less coercive than were those found acceptable in *FERC*. Indeed here, as there, state sovereignty is affirmatively served by encouraging state regulators to avoid federal preemption through their own public interest payphone programs.

In leaving the primary responsibility for public interest payphone programs with the states, the FCC followed the urging of most of the commenters in the rulemaking proceeding, including Petitioner Virginia State Corporation Commission. *Report and Order* ¶ 270 (JA 264-65).[15] Once the FCC adopted that suggestion in its *Report and Order*, subject only to the establishment of general federal guidelines, it was surely incumbent upon any dissatisfied party to give the FCC an opportunity to reconsider and perhaps refine or clarify this formulation of the federal and state roles before challenging it on judicial review. Even if there were any substance to the objection as a matter of law -- and there is none -- it would be particularly inappropriate for this Court to reach out to consider this subsidiary issue in the first instance, at the risk of disrupting the entire program for reform of payphone regulation mandated by the Telecommunications Act of 1996.

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[14] There is no "unfunded mandate" here; public interest payphones would be funded by state governments only if the states choose that option.

The suggestion that state regulators might be subject to criminal sanctions for failing to satisfy the FCC guidelines (Pet. 24) is unrealistic. Federal criminal statutes are not used as vehicles for judicial review of the "fairness" and "equitableness" of regulatory decisions.

[15] As previously noted, the states continue to regulate payphones in most respects. The states will continue to do so, albeit subject to some minimal federal guidelines.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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